***United States Court of Appeals***

***for the Second Circuit***

# APPELLEE'S REPLY BRIEF

# 74-2382

*To be argued by*
MELVYN L. CANTOR

## United States Court of Appeals

FOR THE SECOND CIRCUIT

69 Civ. 442.

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the National Maritime Union of America,

*Plaintiffs-Appellants-Appellees,*

*—against—*

MARTIN SEGAL and LEON KARCHMER,

*Defendants-Appellants-Appellees,*

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, ABRAHAM E. FREEDMAN,

*Defendants-Appellees.*



**On Appeal From the United States District Court For the Southern District of New York**

## REPLY BRIEF OF DEFENDANT-APPELLANT-APPELLEE MARTIN E. SEGAL

SIMPSON THACHER & BARTLETT
*Attorneys for Defendant-Appellant-Appellee, Martin E. Segal*
Office and P. O. Address
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

MELVYN L. CANTOR,
RONALD L. GINNS,
*Of Counsel.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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REPLY BRIEF OF DEFENDANT-APPELLANT-APPELLEE MARTIN E. SEGAL

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## Preliminary Statement

This memorandum is submitted on behalf of defendant-appellant-appellee Martin E. Segal in reply to the Brief of plaintiffs-appellees-appellants ("plaintiffs")

and in further support of Mr. Segal's appeal from that portion of the Order of the Court below which denies him full reimbursement for his attorneys' fees in the defense of this litigation. It is respectfully submitted that, despite a good deal of name calling and attempts at confusion, plaintiffs have presented no basis for requiring Mr. Segal to pay any portion of his attorneys' fees in the defense of this action.

## ARGUMENT

### I.

### MR. SEGAL'S ATTORNEYS' FEES IN DEFENSE OF THIS ACTION SHOULD BE REIMBURSED IN THEIR ENTIRETY

The core of plaintiffs' argument that Mr. Segal is not entitled to reimbursement for his attorneys' fees in this litigation is their contention that Mr. Segal's defense of this suit was in conflict with his duties as trustee and with the July 6, 1970 Order of the Court below as to the proper source of attorneys' fees. There is no merit to either contention.

#### A. There Was No Conflict Between Mr. Segal's Conduct In This Litigation And His Duties As A Pension Plan Trustee

As discussed in detail in Mr. Segal's main Brief, as a trustee of the Pension Plan, Mr. Segal's duties were

set forth in the Trust Agreement and were, above all, to act in accordance with that agreement. Plaintiffs do not dispute that the payments complained of in this action (including principally the Perry payment) were made in accordance with the terms of the Trust Agreement. (See Mr. Segal's main Brief at pp. 8-14). As here relevant, their complaint concerned only whether, under the terms of the NMU Constitution, portions of that Trust Agreement were legally void and should therefore be nullified. Accordingly, in defending the propriety of the payments made, Mr. Segal acted to defend the validity of the Trust Agreement - and, thereby, his own conduct which was totally in accord with the provisions of that agreement.

B. Mr. Segal Did Not Violate The July 6, 1970 Order Of The Court Below

The plaintiffs are in serious error when they state at page 4 of their Brief that Judge Bonsal's July 6, 1970 Order was in recognition of an alleged conflict between Mr. Segal's interests and those of the Trust Agreement. That Judge Bonsal himself did not intend his July 6, 1970 Order to apply to Mr. Segal is clear from his total lack of reliance on that prior order in his decisions which are the subject of the present appeals (Appendix II, pp. 73a ff, 147a ff). That the July 6, 1970 Order did not

relate to Mr. Segal is further made clear from the plaintiffs' prior contemporaneous statements to the Court below.

By Notice of Motion dated June 6, 1969 (Appendix II, p. 212a), plaintiffs applied to the Court below for an order enjoining the defendants from "employing legal counsel retained by the Union (NMU). . .". In his supporting affidavit, sworn to on June 6, 1969 (Appendix II, p. 214a ff), Arthur McInerney, who has been plaintiffs' counsel throughout this litigation, objected only to the retention of Abraham Freedman and Charles Sovel by the defendants Curran, Wall, Perry and Freedman, as their counsel in the defense of this action. The basis stated for this objection was that plaintiffs represented the membership of the NMU, and that since Messrs. Freedman and Sovel were on a retainer from the NMU,* representation of these defendants in this action by Freedman and Sovel was a conflict of interest.

In taking this position, Mr. McInerney referred to "instances where Union officials have been enjoined from using counsel employed by a Union under an annual retainer to defend them." No such basis existed for objection to the retention and manner of payment of independent counsel by Mr. Segal or Mr. Karchmer, who were outside trustees of

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* Mr. Freedman was then General Counsel to the NMU, and Mr. Sovel was his partner.

the Pension Plan. Indeed, no such objection, either expressed or implied, was raised by the plaintiffs until the motion resulting in the order here on appeal was made.*

That plaintiffs' application referred only to the representation of Curran, Wall, Perry and Freedman by counsel on a NMU retainer is further demonstrated by plaintiffs' Notice of Appeal, dated July 29, 1969, in which plaintiffs appealed from the July 3, 1969 Order of the Court below. The Notice states, in relevant part:

> "And also that portion of the said order which denied sub silentio the Plaintiffs' motion to enjoin the individual Defendants Joseph Curran, Shannon Wall, William Perry and Abraham E. Freedman from using Counsel already employed by the Union on a retainer basis."

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* It is noteworthy that this motion was not brought on until January, 1974, after certiorari was denied on the prior appeal. Yet plaintiffs have been on notice since October, 1970, at the time Messrs. Segal and Karchmer served their answers to plaintiffs' interrogatories (see Exhibit H thereto) that the counsel fees of Messrs. Segal and Karchmer were being paid by the Fund. Indeed, in December, 1972, plaintiff Morrissey, represented by Mr. McInerney, sought leave to commence an action in the United States District Court for the Southern District of New York which requested, in part, that Mr. Freedman reimburse the Pension Fund for attorneys' fees incurred by the Fund on behalf of Messrs. Segal and Karchmer in the instant action. Leave was granted and the action was commenced in January, 1973 (Morrissey v. Curran, 73 Civ. 204). In light of this clear notice and prior conduct by Mr. Morrissey and his attorney, one can only surmise that the motion resulting in the instant appeal was brought on principally to keep this litigation alive.

No reference is made to any similar claim against Mr. Segal. This language was repeated, in substantially identical form, in an affidavit of Mr. McInerney, to this Court, sworn to on August 1, 1969.

On the 1969 appeal, this Court remanded plaintiffs' application to the Court below. 423 F.2d 393. At a conference before Judge Bonsal on June 18, 1970, the remand was discussed, and the issue again was stated by Mr. McInerney to be the "continuation of Messrs. Freedman and Sovel in their representation of the officers (Curran and Wall). . .". Thus, Judge Bonsal's July 6, 1970 memorandum opinion (granting plaintiffs' June 6, 1969 motion) discusses only the continued representation of the defendants Curran, Wall, Perry and Freedman by Messrs. Freedman and Sovel at the possible expense of the NMU. It was under these circumstances that Judge Bonsal ordered, on July 6, 1970, "that the defendants are enjoined from employing counsel paid or to be paid with Union funds" (emphasis added). Clearly, this Order was not intended to, and did not, refer to the retention by Mr. Segal of independent counsel who had no connection with the NMU, and the payment of such counsel by the Pension Fund, in defense of the terms of the Trust Agreement under challenge and

Mr. Segal's actions pursuant to those terms.*

Another basic fallacy in plaintiffs' argument is the fact that Mr. Segal's counsel were not, as plaintiffs assert, "paid with Union funds" -- at least insofar as that term was used in the July 6, 1970 Order. Rather, counsel was paid with funds drawn from the Pension Fund in accordance with the terms of the Trust Agreement. And, contrary to the plaintiffs' statement at page 5 of their Brief, this Court did not rule in its prior opinion that the Pension Plan funds were "Union funds" as defined in the July 6, 1970 Order. Rather, the quoted section of that Opinion dealt only with the plaintiffs' standing to bring this action to recover for the NMU treasury funds which may have been paid to the Pension Fund in excess of what was authorized by the NMU Constitution. That was not a ruling, by any stretch of the imagination, that all

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* Plaintiffs' argument, at pages 12 and 13 of their Brief, that Mr. Segal and his counsel knew in December 1972 that the July 6, 1970 Order applied to him also is in error and baseless. By this time, judgment had been entered against Mr. Freedman on his surcharge for wilful misconduct (Appendix I, p. 1233a) and the claims for surcharge against Messrs. Segal and Karchmer had been dismissed. 351 F. Supp. 775 (S.D.N.Y. 1972). The letter quoted at length at this point of plaintiffs' Brief thus presents no "confirmation" that Mr. Segal's right to be reimbursed by the Pension Plan also was "stymied" by the July 6, 1970 Order. Further, contrary to the statement at page 12 of plaintiffs' Brief, as found by the Court below, Mr. Freedman's bill was not paid by the Pension Fund. (Appendix II, p. 76a).

Pension Plan funds are "Union funds" for all purposes. Indeed, from plaintiffs' position in this lawsuit, in obtaining recovery of $674,222.60 from the Pension Plan to the NMU treasury some three years ago, plaintiffs understand that "Union funds," and "Pension funds" are not one and the same.*

C. No Other Basis Exists To Deny Reimbursement To Mr. Segal

As discussed in Mr. Segal's main Brief, both the terms of the Trust Agreement and the common law dictate that Mr. Segal be reimbursed fully for the attorneys' fees he has incurred in this litigation. None of the decisions cited by plaintiffs in their Brief provide any ground for varying this result.

As set forth in Mr. Segal's main Brief, Highway Truck Drivers and Helpers Local 107 v. Cohen, 182 F. Supp. 608 (E.D. Pa.), aff'd per curiam, 284 F.2d 162 (3d Cir. 1960), cert. denied, 365 U.S. 833 (1961), does not deny reimbursement for the successful defense of a suit challenging a trust agreement and seeking to surcharge a trustee. Rather, it states that where there is a conflict between

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* Similarly, Judge Botein's law firm was paid by Pension Plan funds, not Union funds, for engaging in supplementary proceedings prior to finalization on appeal of the surcharge against Mr. Freedman. Although plaintiffs now complain bitterly that these supplementary proceedings were superfluous, it is clear that the trustees had a duty to seek to gain collection from Perry until such time as Freedman was legally compelled to pay the judgment against him.

the interests of a union official and his union, the union official should bear his own litigation expenses until such time as he might be exonerated. If exonerated, the union official may properly seek reimbursement from the union. In the instant action, no conflict existed in Mr. Segal's retention of independent counsel and his successful defense of surcharge in this litigation supports reimbursement.

Similarly, Matter of Estricher, 202 Misc. 431 (Sur. Ct. N.Y. co. 1952), aff'd, 281 App. Div. 828 (1st Dept. 1953), concerned a situation of actual conflict between the trust and trustee. In Estricher, the petitioner had sought the trustee's removal for conduct contrary to the trust's interest. While the trustee was not removed from his office, the Court held that his resistence to removal was solely in his personal interest and not in support of the trust. Accordingly, he was denied reimbursement for attorneys' fees from the trust. In the instant action, Mr. Segal's conduct was completely in accordance with the Trust Agreement, and in defense of that Agreement.*

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* Moreover, neither Estricher nor the provisions of Scott on Trusts (3d Ed. 1967) relied upon by plaintiffs deal with a situation, such as that presented here, where the governing trust agreement contains a clause exonerating a trustee from all liability except for his own wilful misconduct.

Plaintiffs' remaining citations also are inapposite, concerning situations in which union officials guilty of gross misconduct were denied use of union counsel or reimbursement for their attorneys' fees. In fact, all deal only with the conflict issue determined by the July 6, 1970 Order in this action, and are thus irrelevant to the present appeals. Yablonski v. UMW America, 454 F.2d 1036 (C.A.D.C. 1971) cert. denied, 406 U.S. 906 (1972); Tucker v. Shaw. 269 F.Supp. 924, 927-928 (E.D.N.Y. 1966) aff'd, 378 F.2d 304 (2d Cir. 1967); Intl. Brotherhood of Teamsters v. Hoffa, 242 F.Supp. 246, 256 (D.D.C. 1965). In addition, Hoffa, like Highway Truck Drivers above, was prospective only and left open the opportunity for reimbursement of the union officers should they be exonerated. And, in Yablonski, three of the five union attorneys disqualified were themselves defendants in the litigation.

## II.

## THERE IS NO BASIS FOR PROLONGING THIS ALREADY LENGTHY LITIGATION BY REMANDING TO THE COURT BELOW FOR FURTHER PROCEEDINGS

Of course, if this Court agrees with Mr. Segal that there is no basis in fact or in law for requiring him to pay even 39% of his legal fees, there will be no need

for a further hearing in this matter. However, even if this Court should agree with Judge Bonsal that the non-surchargeable conduct of Messrs. Segal and Karchmer warrants denial of reimbursement to them of attorneys' fees, it is clear that reimbursement should be denied only with respect to the Perry matter and not as to those numerous - and in many instances, totally meritless - claims which were defended without any finding of fault or negligence against Mr. Segal.* Plaintiffs' argument that no rational allocation has been made to justify a 61% reimbursement of attorneys' fees is without merit. The suggestion that the allocation among the issues was made on the amount of dollars involved in each is also inaccurate.

As the affidavits submitted below clearly demonstrate, the allocation was made after a careful review and analysis of time records of Mr. Segal's attorneys (to which Mr. McInerney was also given access) and is an attempt to allocate the amount of time devoted to each of the issues presented in this litigation (Appendix

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* It should be noted that the figures stated in plaintiffs' Brief to represent the amounts Mr. Segal has paid his attorneys for his defense here are incorrect, and, in fact, include fees incurred in matters other than the instant litigation. The correct figures are as set forth in Mr. Segal's main Brief, the Reardon affidavits in the Court below (Appendix II, pp. 86a, 95a, 129a), and the decision of the Court below (Appendix II, p. 147a).

II, pp. 86a-92a, 95a-146a). While these records were not sufficiently detailed to permit calculation of the precise amount of time devoted to the Perry matter, as accepted by the Court below, an approximation of a 39% allocation to the Perry problem is reasonable (Appendix II, p. 146a).

This type of determination more than meets the concerns this Court expressed in City of Detroit v. Grinnell Corp., 495 F.2d 448, 468 (2d Cir. 1974). In Grinnell, $1.5 million in fees were sought on a $10 million settlement of private antitrust class actions. This Court's overriding concern, repeatedly expressed in that opinion, was the excessive nature of the fee, and the appearance that the fee was a windfall, based on a "contingent fee syndrome", rather than on the actual work performed. In remanding for a hearing on the appropriate fee amount in that action, this Court stated:

> "Because we feel that this fee was excessive and displayed too much reliance upon the contingent fee syndrome and because we feel that an evidentiary hearing was imperative in this case, we reverse and remand this portion of the District Court's judgment and direct that Court to hold such hearings, consistent with this opinion, to provide sufficient information so that a fair and adequate fee award may be made."

In the instant case, after receiving the type of breakdown it requested, the Court below had sufficient information to

provide a fair and adequate allocation of fees on a time basis, and apparently decided that no formal hearing was necessary. Plaintiffs never seriously disputed this allocation below and it is difficult to see what a formal hearing could add to this allocation process.

## Conclusion

For the reasons discussed above and in Mr. Segal's main Brief, it is respectfully submitted that the decision of the Court below should be reversed insofar as it denies Mr. Segal full reimbursement of all expenses he has incurred and will incur in this litigation.

Respectfully submitted,

SIMPSON THACHER & BARTLETT
Attorneys for Defendant-
Appellant-Appellee
Martin E. Segal
Office and P. O. Address
One Battery Park Plaza
New York, N. Y. 10004
(212) 483-9000

MELVYN L. CANTOR
RONALD L. GINNS

Of Counsel.

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

THOMAS P. RYAN , being duly sworn, deposes and says:

1. That I am over the age of eighteen (18) years, am not a party to this action and reside at 237 Rocking Stone Avenue, Larchmont, New York

2. That on the 28th day of March , 1975 , at approximately 10:25 A.M. , I personally served a copy of the Reply Brief of Defendant-Appellant-Appellee Martin E. Segal

by delivering to and leaving a true copy thereof in a sealed envelope addressed to Herman Cooper, 500 Fifth Avenue, New York, New York, with Ms. Charlton, a receptionist at 500 Fifth Avenue, New York, N.Y., who then caused said envelope and its contents to be placed in Mr. Cooper's mail drop box.

Thomas P. Ryan

Sworn to before me this
28th day of March , 1975.

Copy read
Charles E Friedman
3/28/75

copy received
Dick Taylor
3/28/75